

Military Pension Division: A Review of Cases Following *Howell v. Howell*

by
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I. Introduction

Military divorce is a unique segment of family law and divorce in general. A state may treat military retired pay as community or marital property subject to division, and divide the retired pay pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA).¹ Dividing retired pay between those who served in the military and their spouses requires knowledge of rules, federal law, state law, decisions of courts at various levels, and a familiarity with military service and military retirement.

Military personnel can retire when they have sufficient service, and they receive retired pay based upon years of service.² Retired servicemembers may receive disability pay in addition to retired pay.³ To avoid simultaneous payment from both retired pay and disability sources, Congress mandated that a servicemember waive retired pay in an amount corresponding to the disability pay the servicemember receives.⁴ Servicemembers frequently elect to apply for and obtain disability pay because it is

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¹ 10 U.S.C.S. § 1408(c)(1).

² 10 U.S.C.S. § 9361 and 10 U.S.C.S. § 1405. In the case of guard or reserve component servicemembers, the retirement may be based upon retirement points.

³ 10 U.S.C.S. § 1201.

⁴ 38 U.S.C.S. § 5305.

exempt from federal, state, and local taxation.⁵ In certain situations, waived retired pay can impact the share of a former spouse in a divorce or property division.

Congress specifically defined the retired pay that can be divided with a spouse or former spouse as “disposable retired pay.”⁶ Excluded from the definition of disposable retired pay are all amounts paid as a result of a waiver of retired pay.⁷ Military disability retired pay⁸ based on the percentage of disability is not included in the definition of disposable retired pay.⁹ Also excluded from “disposable retired pay” are amounts owed to the government.¹⁰

Many retirees who are eligible to make an election which results in waived retired pay do so for two primary reasons.¹¹ First, as stated above, the VA benefit is not subject to division with a spouse. Only longevity retired pay may be divided. Second, the servicemember does not have to pay taxes on the VA portion of his or her pay.¹² The result is a net increase in overall income of the servicemember since less of the pay is subject to income tax.¹³

The USFSPA enables the states to divide retired pay. However, because Congress has specifically authorized what may be divided, and the USFSPA is an enabling act, Congress’s definition of divisible pay controls state authority to divide military retired pay. Congress has entered the field and preempted the states from dividing anything other than disposable retired pay.¹⁴

⁵ *Mansell v. Mansell*, 490 U.S. 581, 583-84 (1989).

⁶ 10 U.S.C.S. § 1408(a)(4)(A).

⁷ *Id.* § 1408(a)(4)(A)(ii) (for the deduction requirement); 38 U.S.C.S. § 5304-5 (for the waiver requirement).

⁸ Title 10, Chapter 61 of U.S. Code

⁹ 10 U.S.C.S. § 1408 (a)(4)(A)(iii).

¹⁰ *Id.* § 1408 (a)(4)(A)(i).

¹¹ Mark E. Sullivan, *Military Pension Division: The Spouse’s Strategy*, SILENT PARTNER, <https://www.nclamp.gov/publications/silent-partners/military-pension-division-the-servicemembers-strategy/> (last visited June 8, 2023).

¹² *Id.*

¹³ *Id.*

¹⁴ Chapter 8 of MARK E. SULLIVAN, *THE MILITARY DIVORCE HANDBOOK* 685 (ABA, 3d ed. 2019). For a review of preemption, see Bryan L. Adkins et al., *Federal Preemption: A Legal Primer*, CONGRESSIONAL RESEARCH SERVICE (May 18, 2023), <https://sgp.fas.org/crs/misc/R45825.pdf>.

Waived retired pay may impact the spouses share. The potential consequences are best shown by example. Geoffrey and Heidi Kaufman were married in 1985, separated in 2007, and entered into an agreement in 2008.¹⁵ Mr. Kaufman served in the Navy and retired in 2008.¹⁶ He received military retirement and a 40% rating from the Department of Veterans Affairs (VA).¹⁷ Mr. Kaufman's "military retired pay was reduced by the amount of the VA disability he received."¹⁸ In this case, he received \$610 per month from the VA, resulting in a reduction to Ms. Kaufman of her one-half share, or \$305 per month.¹⁹ The Kaufmans' agreement included a provision providing Ms. Kaufman with a share of Mr. Kaufman's disability pay.²⁰ If the parties had not agreed to this, Ms. Kaufman would have been faced with \$305 per month reduction due to no action of her own. Mr. Kaufman typically would have no duty to inform her in advance or seek her consent prior to obtaining VA disability, which results in waived retired pay and a reduction in a former spouse's share. The consequences to a spouse in such a scenario can be disastrous.²¹ Practitioners must consider the potential impacts of a reduction in retired pay by the future actions of a servicemember when handling a military divorce case before the judgment, agreement, or trial has been finalized or completed.

Waived retired pay and the impact on the divorce must be understood and addressed by counsel representing a servicemember or spouse in their divorce. A review of important cases is essential to gain the understanding needed to properly assist clients faced with a military divorce.

In *Mansell v. Mansell*, the U.S. Supreme Court determined that federal law preempts the states from treating the servicemember's waived retired pay as divisible property with a spouse.²² State family and divorce courts were faced with often

¹⁵ *In re Marriage of Kaufman*, 485 P.3d 991, 994 (Wash. Ct. App. 2021).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ The court allowed Ms. Kaufman to enforce the parties' agreement to divide Mr. Kaufman's VA disability with her on the basis of *res judicata*. *Id.* at 997.

²² *Mansell*, 490 U.S. 581.

harsh results for a spouse in the wake of *Mansell*. New cases based on the *Mansell* decision reached different results in various states.²³ As a result, the U.S. Supreme Court decided to weigh in on the issue of waived military retired pay and indemnification.

On May 15, 2017, the Supreme Court ruled on a case involving waived retired pay, and the court's authority to order reimbursement of waived retired pay to a former spouse. The issue, called *indemnification* from *Howell v. Howell*,²⁴ impacts nearly all family law cases involving a servicemember and his or her spouse. The purpose of this article is to analyze the progeny of the *Howell* case. This article focuses on the state of the law since the *Howell*²⁵ decision. In Part II, the article explores the *Howell* case, the intersection of *Howell* and contract law, and case approaches and outcomes. Part III of the article addresses *res judicata*, including a review of landmark decisions in this area. Part IV discusses two alternative options to consider when faced with an indemnification issue.

II. Analysis of Indemnification Decisions

What is indemnification and why does it matter? In the context of the *Howell* case, indemnification refers to the court's power to require one party to make up lost or reduced benefits of the other party due to waived retired pay. It may also refer to provisions in a court order, divorce decree, or marital settlement agreement that require one spouse to reimburse or make up any losses to the other spouse's benefits. The servicemember in *Howell* received disability compensation payments from the VA. The impact of his receipt of disability payments was a reduction

²³ *Abernethy v. Fishkin*, 699 So. 2d 235, 239 (Fla. 1997)(holding that *Mansell* did not prohibit the voluntary assignment of military disability benefits under the terms of a settlement agreement); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993)(a property settlement agreement that fixed a certain dollar amount from military pay can be enforced even if the disability pay later reduces the retirement pay, so long as the court orders the payment from other sources); *Mallard v. Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012) (federal preemption prevents distribution of military disability benefits under property settlement agreement); *Ryan v. Ryan*, 600 N.W.2d 739 (Neb. 1999)(ruling that the division of veteran's disability benefits as marital property is void).

²⁴ *Howell v. Howell*, 581 U.S. 214 (2017).

²⁵ *Id.*

in his former spouse's share of his military retired pay. An understanding of the indemnification issue requires an examination of the context and history behind the *Howell* decision.

A. *Howell v. Howell*

John and Sandra Howell were divorced in Arizona.²⁶ The divorce decree awarded Mrs. Howell fifty percent of Mr. Howell's military retired pay.²⁷ Mr. Howell retired in 1992, and Mrs. Howell received her one-half share of his retirement.²⁸ Approximately thirteen years later, Mr. Howell applied for and received disability compensation from the VA. Mr. Howell received a disability rating of 20%, resulting in a \$250 per month waiver of retired pay.²⁹ The waiver reduced Mrs. Howell's share by approximately \$125 per month.³⁰ Mr. Howell did not obtain spousal consent nor the court's permission prior to obtaining the disability compensation and waiving a part of his retired pay. Ms. Howell petitioned the court to enforce the decree and require an unreduced payment from Mr. Howell.³¹ The trial court agreed with Ms. Howell, ordering Mr. Howell to indemnify her.³² After the Supreme Court of Arizona upheld the trial court, Mr. Howell petitioned for review to the U.S. Supreme Court.³³

The Supreme Court reversed, holding that the trial court's award of indemnification effectively divided disability benefits.³⁴

²⁶ *Id.* at 218.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* Note that a disability rating of greater than 50% would have resulted in Concurrent Retirement and Disability Pay (CRDP). CRDP is a restoration of waived retired pay. For more information about CRDP, see 10 U.S.C. § 1414 or the CRDP rules at chapter 64 of volume 7B, Department of Defense Financial Management Regulations (DoDFMR). For an article and treatise addressing CRDP, see Mark E. Sullivan & Charles R. Raphun, *Dividing Military Retired Pay: Disability Payments and the Puzzle of the Parachute Pension*, 24 J. AM. ACAD. MATRIM. LAW. 147 (2011), and Chapter 8 of SULLIVAN, *supra* note 14.

³⁰ *Howell*, 581 U.S. at 218. The reader may be surprised to learn that these parties went to the U.S. Supreme Court over \$125 per month.

³¹ *Id.*

³² Note that there was no agreement – this was a court-ordered indemnification.

³³ *Howell*, 581 U.S. at 218.

³⁴ *Id.* at 222.

Justice Stephen Breyer noted in the opinion that courts cannot circumvent the prohibition on division by saying they are only ordering one party to “reimburse” or “indemnify” the other party. This has the same impact as a division of waived retired pay, and therefore is no more than a semantic difference.³⁵ A clear directive followed: “[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule . . . and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. All such orders are thus preempted.”³⁶

The *Howell* case clearly provides that indemnification orders are no longer valid, and a court order directing a servicemember to reimburse a former spouse for any losses due to waived retired pay would be reversible error.³⁷ The U.S. Supreme Court determined there was no distinction between a division of disability pay and the loss of a share in retired pay which was previously divided.³⁸

Howell involved a court-ordered remedy for the reimbursement or indemnification of Ms. Howell, restoring her lost funds from a subsequent waived retired pay.³⁹ Notably, *Howell* only applies to this limited set of facts. It did not involve a private contract between two divorcing spouses, nor did *Howell* address whether such a contract can be enforced. It did involve a direct appeal, and therefore *res judicata* was not a factor. *Howell* did not address whether a decision awarding indemnification is void or void *ab initio*.⁴⁰ *Howell* stands for the proposition that state courts may not order indemnification and effectively treat disa-

³⁵ *Id.*

³⁶ *Id.* The doctrine of preemption stems from the Supremacy Clause of the U.S. Constitution, Article VI, cl. 2, which provides that the laws of the United States “shall be the supreme Law of the Land; and Judges in every State shall be bound thereby.” When Congress enters the territory, its laws preempt any state law to the contrary.

³⁷ See BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 6:10 (Thomson Reuters, 4th ed., 2021).

³⁸ *Howell*, 581 U.S. at 221.

³⁹ *Id.* at 219.

⁴⁰ See *In re Marriage of Weiser*, 475 P.3d 237 (2020) (rejecting the servicemember’s argument that an agreement requiring him to pay his former spouse without reduction was void based upon preemption and *Howell*).

bility pay as divisible property.⁴¹ However, *Howell* does not directly prohibit state courts from honoring indemnification provisions that were already in place in a court order that was not immediately appealed, or in a contract between the parties. These issues and concepts will be addressed below, in conjunction with the review of important post-*Howell* cases.⁴²

Howell relies upon the Uniformed Services Former Spouses' Protection Act (USFSPA).⁴³ The USFSPA was passed as a direct response to *McCarty v. McCarty*, which prohibited the states from dividing retired pay because federal law preempted state law regarding division of military retired pay.⁴⁴ Congress decided to act, and passed the USFSPA as an enabling act. The act was a "grant of power," though a "precise and limited" one that does not include the authority for state courts to divide waived retired pay.⁴⁵ Under USFSPA, a state court may divide only "disposable retired pay" of a servicemember in a divorce.⁴⁶ The definition of "disposable retired pay" in the Act limits what a state court may divide.⁴⁷

B. Following in *Howell's* Footsteps

The U.S. Supreme Court vacated two state court orders which forced retired servicemembers to reimburse former spouses in divorce proceedings because they waived retirement pay in order to receive veteran's disability benefits.⁴⁸ Both of the cases involved court remedies, and neither case dealt with a contractual indemnification clause.

Significant state level litigation followed the *Howell* decision. *Howell* clearly prohibits a state court from entering a court

⁴¹ *Howell*, 581 U.S. at 221.

⁴² There are many cases that follow *Howell* - a search on LexisNexis shows more than 110 cases. This article will not go through each and every case due to space and time constraints. Instead, the cases are characterized to the extent possible in groups based upon the decision(s) and argument(s) put forth.

⁴³ 10 U.S.C.S. § 1408.

⁴⁴ *McCarty v. McCarty*, 453 U.S. 210 (1981).

⁴⁵ *Mansell*, 490 U.S. at 589.

⁴⁶ 10 U.S.C.S. § 1408 (a)(4)(A).

⁴⁷ *Mansell*, 490 U.S. at 584-85.

⁴⁸ *Merrill v. Merrill*, 137 S. Ct. 2156 (2017) (reversing a post-decree indemnification order); *Cassinelli v. Cassinelli*, 138 S. Ct. 69 (2017) (reversing compensation in the form of a dollar-for-dollar alimony award).

ordered indemnification.⁴⁹ However, *Howell* did not clearly address other scenarios, such as when the parties have entered into a private contract. As indicated below, some appellate courts did not stop to think whether the underlying facts of the case presented matched the *Howell* case, or whether *Howell* directly addressed issues such as enforcement of a private contract.

Alabama has at least three cases that follow *Howell*. In 2018, the Alabama Civil Appeals Court decided *Brown v. Brown*.⁵⁰ The *Brown* trial court incorporated the parties' agreement into the divorce judgment.⁵¹ The agreement provided that Mrs. Brown would receive 25% of Mr. Brown's retired pay, and included indemnification language.⁵² Mr. Brown retired with military disability retired pay (MDRP) pursuant to Title 10, Chapter 61 of the US Code.⁵³ Like waived retired pay, military disability retired pay is excluded from the definition of disposable retired pay.⁵⁴ The Defense Finance and Accounting Service (DFAS) refused to pay the wife her share directly, and the wife petitioned the court for relief. The trial court awarded her a share of Mr. Brown's military disability retirement pay. The husband appealed.

The court held that the trial court could not indemnify the spouse or increase her share pro rata when the retiree opted to waive retired pay in favor of disability pay. Finding that the state court can award a contingent interest in future retired pay, the Alabama Court of Civil Appeals referenced portions of the *Howell* decision which indicate that the future possibility of the servicemember's waiver was outside of the purview of a state court.⁵⁵ The court went on to say "[w]e can draw no meaningful

⁴⁹ *Howell*, 581 U.S. at 221.

⁵⁰ *Brown v. Brown*, 260 So. 3d 851 (Ala. Civ. App. 2018).

⁵¹ *Id.* at 853.

⁵² *Id.*

⁵³ For more information on military disability retired pay, see Chapter 8, of SULLIVAN, *supra* note 14, or *Q&A – Military Disability Retired Pay*, SILENT PARTNER, <https://www.nclamp.gov/media/730645/qa-military-disability-retired-pay.pdf> (last visited June 7, 2023).

⁵⁴ 10 U.S.C.S. § 1408 (a)(4)(A)(iii). Note that the monthly retired pay of a servicemember with MDRP is computed by either using the member's years of service or the disability percentage. Federal law excludes only the amount computed by using the member's disability percentage.

⁵⁵ *Brown*, 260 So. 3d at 858.

distinction between the circumstances in *Howell*, in which the military member waived retirement benefits to receive disability benefits from the VA, and the circumstances in this case.”⁵⁶ The Alabama court missed an important distinction. *Howell* did not involve a contract, whereas *Brown* was based upon an agreement of the parties.

Military disability retired pay, retirement based on Title 10, Chapter 61 of the U.S. Code, represents a distinct issue as compared to waived retired pay. There are similarities since both waived retired pay and the disability portion of military disability retired pay are excluded from the definition of disposable retired pay, and therefore cannot be divided with a spouse.⁵⁷ The major difference for a divorce or family law practitioner is that waived retired pay involves the servicemember’s voluntary actions – he elects to receive disability pay. In contrast, military disability retired pay is an involuntary separation from the military based on fitness to continue to serve.⁵⁸ The result of a reduction or elimination of a spouse’s share applies to both, and both issues will continue to come up in a military divorce case.

In a case that followed *Brown*, *Williams v. Burks*, the Alabama Court of Civil Appeals held that the trial court lacked authority to award any portion of the husband’s VA disability benefits to the wife.⁵⁹ *Williams* did not involve an agreement, but rather a court-ordered clause requiring payment of disability benefits to the wife.⁶⁰ This important distinction means *Williams* correctly followed the *Howell* decision because *Howell* clearly prohibits court ordered indemnification provisions and awards dividing a servicemember’s disability pay.

An order requiring indemnification was struck down in a 2017 case out of Maryland, *Hurt v. Jones-Hurt*.⁶¹ Like Mr. Howell, Mr. Hurt did not receive a VA disability benefit based upon his service-connected disabilities until years after the di-

⁵⁶ *Id.*

⁵⁷ 10 U.S.C.S. § 1408.

⁵⁸ SULLIVAN, *supra* note 11.

⁵⁹ *Williams v. Burks*, No. 2200169, 2021 Ala. Civ. App. LEXIS 118, at *1 (Ala. Civ. App. Nov. 5, 2021).

⁶⁰ *Id.* at *3.

⁶¹ 168 A.3d 992 (Md. Ct. Spec. App. 2017).

voiced.⁶² Mr. Hurt's overall compensation was not reduced — he received the same amount following his receipt of disability benefits despite his election of disability.⁶³ However, Mrs. Jones-Hurt's share of retired pay was reduced by one-third.⁶⁴ The trial court awarded an unreduced dollar amount to compensate Mrs. Jones-Hurt, and Mr. Hurt appealed.⁶⁵ He argued that the court's order was not a division based upon an agreement of the parties, that prior Maryland precedent allowing indemnification was wrongly decided under *Howell*, and that the trial court improperly considered his military disability in awarding Mrs. Jones-Hurt relief.⁶⁶

On the appeal, the Maryland Court of Special Appeals recognized the difficulty faced in military family law cases, saying “military benefits are creatures of federal law, and the treatment of military benefits in state divorce proceedings has been a source of federal and state tension for decades.”⁶⁷ The court noted the situation where a servicemember may waive retirement pay years after the property division creates “opportunities for disagreements and gaming, though, especially when the election comes after the property division is finalized.”⁶⁸ Despite these challenges, the court followed *Howell*, holding that *Howell* in effect overruled Maryland precedent allowing for reimbursement or indemnification, and reversing the judgment making Ms. Jones-Hurt whole.⁶⁹

C. *Howell and Contract Law*

Next door to Maryland, the Commonwealth of Virginia addressed the indemnification issue in the *Yourko v. Yourko (Yourko I)*⁷⁰ case. The parties in *Yourko* negotiated an agreement resolving the division of the husband's military retired

⁶² *Id.* at 994.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 997.

⁶⁷ *Id.*

⁶⁸ *Id.* at 998.

⁶⁹ *Id.* at 994.

⁷⁰ *Yourko v. Yourko*, 866 S.E.2d 588 (Va. App. 2021). Appeal was granted to the Virginia Supreme Court in September of 2022 on five bases, one of which was that the Virginia Court of Appeals erred in applying *Howell*. The

pay.⁷¹ The agreement contained indemnification language, specifically referring to the possibility of waived retired pay due to the husband's receipt of disability compensation.⁷² The husband objected to the indemnification language of the orders, but the orders became final and neither side appealed.⁷³ One year later, Mr. Yourko challenged the agreement as being in violation of federal law.⁷⁴ The trial court refused to set aside the orders, and the court of appeals reversed.⁷⁵

Mr. Yourko received disability pay that was not divisible with his former spouse.⁷⁶ As a result of Mr. Yourko's disability pay, Ms. Yourko's share was reduced by approximately \$1,000 per month.⁷⁷

The court of appeals in *Yourko*, which will be referred to as *Yourko I*, interpreted *Howell* to preempt all indemnification orders.⁷⁸ Mrs. Yourko argued that the parties are free to negotiate an agreement which includes indemnification language. The court did not find the ex-wife's argument persuasive, and held that "courts should not issue orders that require or permit servicemembers to make contracts, guarantees, or indemnification promises to former spouses in contravention of *Howell*."⁷⁹

To reach this conclusion, the *Yourko I* court relied upon three portions of language from *Howell*. First, *Howell* specifically asks and answers a question:

Can the State subsequently increase, pro rata, the amount the divorced spouse receives each month from the veteran's retirement pay in order to indemnify the divorced spouse for the loss caused by the veteran's waiver? The question is complicated, but the answer is not.

Virginia chapter of the AAML filed an amicus curiae brief in support of Mrs. Yourko.

⁷¹ *Id.* at 590.

⁷² *Id.* at 591.

⁷³ *Id.*

⁷⁴ *Id.* The husband also argued mutual mistake, that the orders were hopelessly flawed, and exceeded the 50% limit on disposable retired pay division found at 10 U.S.C.S. § 1408 (e)(1).

⁷⁵ *Id.*

⁷⁶ *Yourko v. Yourko*, 884 S.E.2d 799, 801 (Va. 2023).

⁷⁷ *Id.*

⁷⁸ *Yourko*, 866 S.E.2d 595.

⁷⁹ *Id.* at 596 (quotation marks omitted).

Our cases and the statute make clear that the answer to the indemnification question is “no.”⁸⁰

Second, *Yourko I* judges were persuaded by *Howell*'s pronouncement that requiring reimbursement or indemnification is “a semantic difference and nothing more.”⁸¹ Third, *Yourko I* relied upon *Howell*'s conclusion that indemnification orders displace the federal rule.⁸²

There is little similarity between the facts of *Howell* and those in *Yourko*. *Howell* involved a court-ordered indemnification, whereas *Yourko* involved the parties' agreement. The Arizona trial court in *Howell* ordered a reimbursement from Mr. Howell to make up for Ms. Howell's reduced share due to waived retired pay. In contrast, Mr. and Ms. Yourko entered into an agreement, and only later did the husband object. The court in *Yourko I* did not appear to consider the implications of the factual distinctions between the two cases. The results of the *Yourko I* decision are troubling, and the court's analysis of the similarities and differences between the facts and circumstances lacks depth.

The *Yourko I* court's holding renders agreements unenforceable, meaning the courts cannot enforce their own orders and the parties' agreements if those documents involve indemnification and military retired pay that has been waived for disability. The law has long allowed a party to a domestic relations case to agree to provisions that are not what the court would or could order.⁸³ One of the primary benefits of settlement is the ability

⁸⁰ *Howell*, 581 U.S. at 216.

⁸¹ *Id.* at 215.

⁸² *Yourko*, 866 S.E.2d at 598.

⁸³ See *Wyatt v. Wyatt*, 318 S.E. 2d 251 (N.C. Ct. App. 1984). In *Wyatt*, the parties agreed to terms regarding a marital home, among other property matters. Despite the husband's objection that the agreement regarding the sale of real estate was contrary to law, and despite the court's finding that “the terms . . . are rather unusual and their disadvantageous effect on each of the parties may not have been fully appreciated at the time,” the court held that the parties' agreement was enforceable and must be enforced. *Id.* at 254. See also *Pond v. Pond*, 700 N.E.2d 1130, 1136 (Ind. 1998) (citations and quotation marks omitted) (“Indiana courts have not hesitated to enforce a divorce settlement agreement which would have been in excess of the divorce court's authority had it been crafted by the divorce court and which was shown to be, over time, grossly inequitable.”).

to be creative, to include terms that the court may not include, and to use a combination of imaginative terms to balance the parties' positions as the parties see fit. The *Yourko I* decision tramples on the sanctity of contract, the freedom of the parties to resolve disputes as they so desire, and the reasonable expectation of divorcing parties that the court should enforce their agreement.

Ms. Yourko appealed to the Virginia Supreme Court and, in March of 2023, the Supreme Court of Virginia decided *Yourko II*.⁸⁴ Ms. Yourko argued that *Howell* prevents a state court from ordering indemnification, but does not address (nor prevent) the parties from entering into a voluntary agreement which includes indemnification.⁸⁵ The Supreme Court agreed.⁸⁶

The issue stated by the Virginia Supreme Court was whether the USFSPA⁸⁷ and *Howell* invalidated indemnification provisions in an agreement between two divorcing parties.⁸⁸ Justice Powell correctly analyzed that both *Mansell*⁸⁹ and *Howell*⁹⁰ served as potential limitations on the court's authority to divide retired pay that was not divisible under the USFSPA.⁹¹ However, neither *Mansell* nor *Howell* involved an agreement containing indemnification language, nor did either case address the enforceability of such language.⁹² The parties' agreement was contained within a military pension division order or MPDO, which must be interpreted as a contract under Virginia law.⁹³ Because *Mansell* and *Howell* did not involve an agreement, the Virginia Supreme Court concluded that *Mansell* and *Howell* did not apply, and did not limit or restrict enforcement of a contract containing an indemnification provision.⁹⁴ *Yourko II* overruled *Yourko I*, holding "*Howell* is not implicated when a court seeks to enforce an otherwise valid indemnification provision. Rather, by the plain

⁸⁴ *Yourko*, 884 S.E.2d 799.

⁸⁵ *Id.* at 802.

⁸⁶ *Id.*

⁸⁷ 10 U.S.C.S. § 1408.

⁸⁸ *Yourko*, 884 S.E.2d at 802-03.

⁸⁹ *Mansell*, 490 U.S. 581.

⁹⁰ *Howell*, 581 U.S. 214.

⁹¹ *Yourko*, 884 S.E.2d at 804.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

language of the opinion, *Howell* is only implicated when a court seeks to circumvent the USFSPA by ordering indemnification.”⁹⁵

The Virginia Supreme Court also addressed whether the retired servicemember could use his disability pay to satisfy the indemnification provision and reimburse Ms. Yourko, his former spouse.⁹⁶

[N]either Congress nor the United States Supreme Court has ever placed any limits on how a veteran can use this personal entitlement [to disability pay] once it has been received. In other words, federal law does not prohibit a veteran from using military disability pay in any manner he or she sees fit, provided the money is paid directly to the veteran first; indeed it expressly permits such usage.⁹⁷

Howell reaffirms and clarifies *Mansell*, but it has no effect on a separate line of cases stemming from *Rose v. Rose*, which allow the state court to take a veteran’s disability benefits into consideration as income for a property settlement payment.⁹⁸

The importance of the *Yourko II* decision cannot be overstated. *Yourko II* upholds the sanctity of decades of contract law which allows divorcing spouses to agree to terms, even if those terms do not reflect exactly what a court would or could order. *Yourko II* recognizes that it is “one thing to argue about a judge’s power to require under principles of fairness and equity, a duty to indemnify; that approach has been eliminated by the *Howell* decision. It’s another matter entirely to require a litigant to perform what he has promised in a contract.”⁹⁹

Another case involving the sanctity of contract was *Gross v. Wilson*.¹⁰⁰ Mr. Gross and Mrs. Wilson divorced in 2014.¹⁰¹ The agreement provided that Mrs. Wilson was to receive 50% of the military retirement for Mr. Gross’s service in the Coast Guard and 50% of her husband’s VA disability compensation.¹⁰² Mrs. Wilson filed to enforce the settlement agreement, and Mr. Gross opposed, arguing that the USFSPA exempts VA payments from

⁹⁵ *Id.* at 805 (italics in original).

⁹⁶ *Id.* at 804.

⁹⁷ *Id.* (citations omitted).

⁹⁸ *Rose v. Rose*, 481 U.S. 619 (1987).

⁹⁹ *Yourko*, 884 S.E.2d at 804-05, quoting SULLIVAN, *supra* note 14, at 691.

¹⁰⁰ *Gross v. Wilson*, 424 P.3d 390 (Alaska 2018).

¹⁰¹ *Id.* at 393.

¹⁰² *Id.*

division.¹⁰³ The trial court ordered Mr. Gross to pay both arrearages and continuing payments.¹⁰⁴ Mr. Gross appealed.¹⁰⁵

Mr. Gross argued¹⁰⁶ that the court improperly ordered him to indemnify Mrs. Wilson by ordering him to pay her a share of his VA disability benefits.¹⁰⁷ The Alaska Supreme Court distinguished *Howell*, noting that *Howell* involved a court ordered indemnification.¹⁰⁸ Mr. Gross did not waive retirement to receive disability pay post-divorce, rather he stopped paying Mrs. Wilson her share of VA disability.¹⁰⁹ The court determined that “*Howell* does not hold that a state court cannot enforce a property division,” which was an agreement in this case.¹¹⁰ Like *Yourko II*, the Alaska court understood that *Howell* involved a court-ordered indemnification, and did not prevent a state court from enforcing a contract agreed upon by the parties.

D. *More Contracts, More Problems?*

In an effort to follow the *Howell* decision, some courts have expanded upon *Howell's* limited prohibition on court ordered indemnification. This section analyzes some of those decisions.

On October 2, 2017, the Minnesota Court of Appeals decided *Berberich v. Mattson*.¹¹¹ Mrs. Berberich and Mr. Mattson entered into a stipulated decree approved by the district court.¹¹² The agreed upon language provided that Mrs. Berberich would receive 40% of Mr. Mattson's retirement pay and “military disability compensation.”¹¹³ Mr. Mattson did not pay as agreed, and Mrs. Berberich sought enforcement.¹¹⁴ The trial court ordered

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 393-94.

¹⁰⁵ *Id.* at 394.

¹⁰⁶ Note that Mr. Gross made other arguments, including requesting Rule 60 relief and that the order was void. If faced with either of those arguments, the *Gross v. Wilson* opinion may be of assistance. This article focuses on *Howell*, which primarily addressed indemnification.

¹⁰⁷ *Gross*, 424 P.3d at 399.

¹⁰⁸ *Id.* at 401.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Berberich v. Mattson*, 903 N.W.2d 233 (Minn. Ct. App. 2017).

¹¹² *Id.* at 235.

¹¹³ *Id.* at 236.

¹¹⁴ *Id.*

Mr. Mattson to pay Mrs. Berberich her share of his military retired pay and disability compensation. Mr. Mattson appealed.

On appeal, the court focused first on the goals of the legislation at hand. The policy goal of Congress is to protect veterans' benefits and ensure that they reach the veterans, with longer-term objectives of incentivizing participation in the military and building a strong national defense.¹¹⁵ Turning to the doctrine of preemption, the court conducted a *de novo* review.¹¹⁶

Mrs. Berberich asserted that Mr. Mattson was bound by contract. Further, she argued that Mr. Mattson had not challenged the decree. Therefore, the decree should be enforced. The *Berberich* court found that federal law preempts state law, noting that "*Howell* effectively overruled cases relying on the sanctity of contract to escape federal preemption."¹¹⁷ The problem with this statement is that *Howell* did not deal with a contract dispute or with the enforcement of a contract; rather the case involved the absence of a contractual indemnification clause and, to make up for the omission, a court ordered indemnification. *Berberich* and *Yourko I* expand *Howell* to cases involving a contract between divorcing spouses, where no such issue was briefed, argued, or ruled upon in *Howell v. Howell*.¹¹⁸

Another case that expands *Howell* into the arena of contract comes out of Kansas. The *Babin* case involved the intersection of disposable retired pay and a contractual property settlement.¹¹⁹ Mr. Babin agreed to provide 43% of his military benefits, including disability pay, to Ms. Babin as part of a mediated settlement agreement.¹²⁰ The trial court adopted the agreement and approved a division of Mr. Babin's military disability bene-

¹¹⁵ *Id.* at 236 (citations omitted).

¹¹⁶ *Id.* at 237. The court conducted a review of federal law and many cases which are not reviewed above.

¹¹⁷ *Id.* at 241. The *Berberich* court is primarily referring to *Krapf v. Krapf*, 786 N.E.2d 318 (Mass. 2003). *Howell* did not involve a contract situation, argument, or theory. The *Berberich* court did not distinguish the factual differences between *Krapf* and *Howell*, particularly that the servicemember in *Krapf* had signed a separation agreement. *Krapf*, 786 N.E.2d 318. Further, the *Krapf* court interpreted the agreement to include all pay types, even disability. *Id.* at 324. It did not involve an indemnification clause.

¹¹⁸ *Howell*, 581 U.S. 214.

¹¹⁹ *In re Babin*, 437 P.3d 985 (Kan. Ct. App. 2019).

¹²⁰ *Id.* at 986-87.

fits.¹²¹ Mr. Babin asked the court to reconsider, and to allow relief from the judgment, arguing that the court had no jurisdiction to divide his disability benefits pursuant to *Howell*.¹²² The trial court denied Mr. Babin's requests, and he appealed.

On appeal, the primary issue for the Kansas Court of Appeals was whether federal law preempted the state court's ability to enforce the parties' agreement regarding Mr. Babin's VA disability pay.¹²³ Mrs. Babin's arguments centered around contractual agreements, stating that the court should order Mr. Babin to pay since he agreed to pay. The *Babin* appellate court found that the trial court lacked jurisdiction to order a division of Mr. Babin's VA disability benefits, regardless of the fact that Mr. Babin contracted away his rights and agreed to divide the VA money with Ms. Babin. The Kansas Court of Appeals held that the trial court lacked jurisdiction to enforce the agreement because federal law does not include disability pay within the definition of disposable retired pay,¹²⁴ and *Howell* holds that the state court cannot vest that which it lacks authority to give.¹²⁵ Like *Berberich* and *Yourko I*, *Babin* expands *Howell* into the arena of the private contract. *Babin* improperly holds that *Howell* prevents the court from enforcing its own orders or a parties' agreement regarding indemnification, expanding *Howell* beyond what is contained in the plain language of the opinion and what is supported by the facts underlying the *Howell* decision.

In 2017, the Court of Appeals of Tennessee decided the *Vlach v. Vlach* case.¹²⁶ The parties in *Vlach* entered into a marital dissolution agreement which was incorporated into the final decree of divorce.¹²⁷ The document awarded Mrs. Vlach 26% of Mr. Vlach's retirement, including any "disability pension to which the Husband is entitled."¹²⁸ Mr. Vlach failed to pay the wife her portion of the retirement benefits.¹²⁹ Based upon the parties' agreement, the court held Mr. Vlach in contempt, or-

¹²¹ *Id.*

¹²² *Id.* at 987-88.

¹²³ *Id.* at 988.

¹²⁴ 10 U.S.C.S. § 1408 (a)(4)(A).

¹²⁵ *Howell*, 581 U.S. at 221.

¹²⁶ *Vlach v. Vlach*, 556 S.W.3d 219 (Tenn. Ct. App. 2017).

¹²⁷ *Id.* at 221.

¹²⁸ *Id.*

¹²⁹ *Id.* at 222.

dered him to pay arrears, and awarded attorney fees.¹³⁰ Mr. Vlach appealed.

The court of appeals determined that enforcing the agreement because the wife has a vested interest approach and using indemnification language were both outlawed by *Howell*.¹³¹ Limiting Ms. Vlach's share to disposable retired pay, the court of appeals held that the trial court lacked authority to divide Mr. Vlach's disability benefits. In effect, *Vlach* holds that *Howell* overrules contract law. Enforcing a contract and a court-ordered indemnification are two distinct things. *Howell* addressed a state court ordering a party to reimburse or indemnify the other party for a reduced share of retired pay; it is an entirely separate matter for a court to enforce a binding agreement between the parties.

Interestingly, Mr. Vlach claimed he received a VA disability rating of 100%.¹³² Under the rules,¹³³ a VA disability rating of 100% should result in Concurrent Retirement and Disability Pay (CRDP), meaning a restoration of waived retired pay.¹³⁴ The restored pay is divisible with a spouse.¹³⁵ The court seemed unaware of whether Mr. Vlach's pay was waived, saying "the practical effect of Husband's receipt of disability benefits might be a complete waiver of retired pay."¹³⁶ This is highly unusual as Ms. Vlach should have been able to receive a division of CRDP, restored retired pay that would otherwise have been waived, from the retired pay center.¹³⁷

¹³⁰ *Id.*

¹³¹ *Id.* at 225.

¹³² *Id.*

¹³³ 10 U.S.C. § 1414. The implementing rules are found at Chapter 64, Volume 7B of the DoDFMR (Department of Defense Financial Management Regulation).

¹³⁴ SULLIVAN, *supra* note 14, at ch. 8.

¹³⁵ *Id.*

¹³⁶ *Vlach*, 556 S.W.3d at 225.

¹³⁷ The two retired pay centers are Defense Finance and Accounting Service (DFAS) and the U.S. Coast Guard Pay and Personnel Center. The Pay and Personnel Center serves all Coast Guard members and retirees, and DFAS serves the other branches of the military.

E. *The Right Side of Contract*

A case that correctly handles the intersection of *Howell* and contract is *Jones v. Jones*.¹³⁸ Mr. and Mrs. Jones separated in 2018 and reached an agreement to divide the community property.¹³⁹ The agreement provided Mrs. Jones with \$1,200 per month, from all amounts her husband received for military retirement, including those amounts waived for VA benefits.¹⁴⁰ The agreement also included indemnification language, requiring the husband to make up any reductions in the wife's pay.¹⁴¹

Mr. Jones stopped paying \$1,200 per month to Mrs. Jones in June of 2019.¹⁴² Mrs. Jones filed a motion to enforce the property settlement.¹⁴³ Note that this case may have involved military disability pay under Chapter 61, Title 10 of the U.S. Code.¹⁴⁴ The trial court determined that federal law precluded enforcement because the funds would be from Mr. Jones' disability compensation.¹⁴⁵

The parties attempted to work out an agreement.¹⁴⁶ With no agreement in place, Mrs. Jones filed for Rule 60 relief in 2020.¹⁴⁷ The trial court ruled that it could enforce the settlement agreement, and therefore Rule 60 relief was not necessary.¹⁴⁸ Mr. Jones appealed.¹⁴⁹

The Alaska Supreme Court distinguished the *Howell* case. *Howell's* holding prevents state courts from "simply order[ing] a military spouse who elects disability pay to reimburse or indem-

¹³⁸ *Jones v. Jones*, 505 P.3d 224 (Alaska 2022).

¹³⁹ *Id.* at 227.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* Mr. Jones stated "he had been determined unemployable after a physical exam," which sounds like the process associated with a medical evaluation by which the military determines whether Mr. Jones would be fit for continued service. If determined not to be fit, he would be medically retired.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 228.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* Mr. Jones asked for reconsideration, which was denied. The appeal followed.

nify the other on a dollar for dollar (sic) basis.”¹⁵⁰ Correctly surmising that *Howell* is limited to court-ordered indemnification, the Alaska Supreme Court upheld the trial court’s enforcement of the parties’ agreement. Courts must take into account the financial effects of a military retiree’s disability pay, and retirement pay, in addition to disability and waived retired pay.¹⁵¹ “A careful review of *Mansell* reveals that the United States Supreme Court did not preclude spouses from contractually agreeing to divide non-disposable retired pay.”¹⁵² *Howell* does not preclude a military spouse from agreeing to indemnification, nor does it preclude courts from enforcing a valid contract or agreement.¹⁵³

F. *Whom Do You Represent?*

If counsel represents the party seeking to avoid a division of military disability benefits, the analysis should start with the *Mansell*¹⁵⁴ and *Howell*¹⁵⁵ opinions. The holding in *Mansell* is clear: USFSPA only allows division of disposable retired pay, and courts may not treat retired pay waived in order to receive VA disability benefits as divisible with a spouse.¹⁵⁶ *Mansell* also makes it clear that USFSPA imposes “substantive limits on state courts’ power to divide military retired pay.”¹⁵⁷

Following in the footsteps of *Mansell*, *Howell* makes it clear that court-ordered indemnification is beyond the power of state courts.¹⁵⁸ A state court lacks authority to “avoid *Mansell* by describing the family court order as an order requiring John [Howell] to reimburse or indemnify Sandra [Howell], rather than an order that divides property. The difference is semantic and nothing more.”¹⁵⁹ Based upon *Mansell* and *Howell*, counsel for the servicemember should tread carefully and seriously consider the issue before agreeing to indemnification language in the marital settlement agreement, separation agreement, or divorce de-

¹⁵⁰ *Id.* at 230.

¹⁵¹ *Id.* (quotation and citation omitted).

¹⁵² *Selitsch v. Selitsch*, 492 S.W.3d 677, 686 (Tenn. Ct. App. 2015).

¹⁵³ *Jones*, 505 P.3d at 230.

¹⁵⁴ *Mansell*, 490 U.S. 581.

¹⁵⁵ *Howell*, 581 U.S. 214.

¹⁵⁶ *Mansell*, 490 U.S. at 583.

¹⁵⁷ *Id.* at 590-91.

¹⁵⁸ *Howell*, 581 U.S. at 221.

¹⁵⁹ *Id.*

cree. The argument follows that preemption applies, and a state court does not have jurisdiction to divide what Congress has said cannot be divided. In addition, counsel should consider the use of the cases above, as well as other cases which have held that the trial court lacked authority to divide disability benefits.¹⁶⁰ If faced with a contractual agreement, a practitioner may wish to argue that *Howell* expressly overruled a contract theory case.¹⁶¹

The latter sections below address possible remedies and arguments for the spouse. The reduction in a spouse's share of the military pension due to limits on what military retired pay is divisible can be financially catastrophic. For this reason, commentators are admittedly critical of a policy that effectively singles out military spouses as a special class of divorcing spouses.¹⁶² No other spouse who receives a pension share in a domestic relations case has federal law operating to effectively limit his or her share of the retired pay.

The purposes and objectives of Congress in protecting servicemembers are justified. Servicemembers sacrifice greatly to best protect our nation, and the author has the utmost respect for servicemembers. This is particularly true of servicemembers with a disability, as they have literally sacrificed body, mind, and spirit for the greater good.

However, as Brett Turner argues, "it is hard to see the equity in Congress giving military service members special rights to retain their pensions upon divorce, free from claims which former spouses are permitted to make under property division law generally."¹⁶³ Military spouses also make sacrifices in their service to the country. Many military spouses must forego careers due to frequent moves. They are therefore unable to contribute to their own retirement plans, and are forced to rely on the servicemember's retirement benefits. While that may work so long as the parties stay married, penalizing divorcing spouses of servicemembers when they have also made large sacrifices is unfair

¹⁶⁰ See, e.g., *Phillips v. Phillips*, 820 S.E. 2d 158, 163-64 (Ga. Ct. App. 2018) (vacating the trial court's order because the court "overstepped its authority" in ordering an indemnification of the wife based upon the husband's disability retirement).

¹⁶¹ *Howell*, 581 U.S. 214.

¹⁶² TURNER, *supra* note 37, at § 6.

¹⁶³ *Id.* at § 6:10, at 94.

and prejudicial. Former spouses of servicemembers are singled out as a special class of divorcing parties, harmed by a discriminatory policy. A statute entitled the “Uniformed Services Former Spouses Protection Act” should protect, rather than limit, former spouses of servicemembers.

III. *Res Judicata*

Res judicata is alive and well in the area of military retired pay and military family law. *Res judicata* is a matter of state law.¹⁶⁴ The doctrine bars re-litigation of the same issue, and may encompass the principles of issue preclusion and claim preclusion.¹⁶⁵ Elements of *res judicata* include a final judgment on the merits and the same or similar claim between identical parties.¹⁶⁶ This section reviews cases and arguments using *res judicata* as a basis to seek a division of waived retired pay or pay that is otherwise excluded from USFSPA.

Iowa ruled upon a post-*Howell* case in 2022. The *In re Marriage of Erlandson* case begins with the best opening line of all the cases covered here: “To paraphrase a Scottish poet, even the best-laid plans often go awry.”¹⁶⁷ In *Erlandson*, the parties stipulated to a 50% division of retirement.¹⁶⁸ The agreement was approved by the court and incorporated into the divorce decree.¹⁶⁹ The original agreement did not specify details regarding Mrs. Erlandson’s share or Mr. Erlandson’s military service, and the court added terms to the decree on these matters and required a separate military pension division order.¹⁷⁰ The military pension division order provided Mrs. Erlandson with a 50% share of Mr.

¹⁶⁴ *Mansell*, 490 U.S. 581.

¹⁶⁵ *Edwards v. Edwards*, 132 N.E.3d 391, 396 (Ind. Ct. App. 2019).

¹⁶⁶ “For *res judicata* to apply, a party must show that the previous suit resulted in a final judgment on the merits, that the same cause of action is involved, and that both the party asserting *res judicata* and the party against whom *res judicata* is asserted were either parties or stand in privity with parties.” *State ex rel. Tucker v. Frinzi*, 474 S.E.2d 127, 128 (N.C. 1996) (quotation omitted). *Res judicata* is sometimes called “judicial estoppel” or “claim preclusion.”

¹⁶⁷ *In re Marriage of Erlandson*, 973 N.W.2d 601, 603 (Iowa Ct. App. 2022), paraphrasing Robert Burns.

¹⁶⁸ *Id.* at 604.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

Erlandson's retired pay.¹⁷¹ It also provided that "retired pay" included any amounts of retired pay "actually or constructively" waived, including money waived to receive VA disability.¹⁷² The court also retained jurisdiction to carry out the original intent of the court—50% to compensate Mrs. Erlandson—via a reconfigured property division, damages, or alimony.¹⁷³

Years later, Mr. Erlandson was evaluated by the military and determined to be unfit for continued duty.¹⁷⁴ Mr. Erlandson received military disability retired pay under Chapter 61 of Title 10 of the U.S. Code.¹⁷⁵ Mrs. Erlandson asked the court to modify the original property division and spousal support award based upon the court's prior reservation of jurisdiction.¹⁷⁶

In a summary judgment proceeding, Mr. Erlandson argued that Mrs. Erlandson's interest was contingent upon his reaching 20 years of creditable service, that his military disability pay was not divisible under USFSPA, and that *Howell* prevented the court ordering an indemnification of Mrs. Erlandson's share.¹⁷⁷ Mrs. Erlandson argued she was asking the court to enforce its prior order under the doctrine of *res judicata*, as the order had not been appealed by either party.¹⁷⁸ The court granted summary judgment in favor of Mr. Erlandson, and Mrs. Erlandson appealed.

The Iowa Court of Appeals ruled that state law did not allow for modification of a property division. Further, it found that Mrs. Erlandson could not demonstrate the necessary components for a modification of spousal support under Iowa law. The trial court's order was affirmed by the Court of Appeals.

Mrs. Erlandson's argument regarding *res judicata* was almost entirely ignored by the Iowa Court of Appeals. It was only mentioned one time in the text of the opinion, and only in reference to the argument made by Mrs. Erlandson.¹⁷⁹ No analysis was provided by the Court of Appeals in the opinion itself. In a foot-

¹⁷¹ *Id.*

¹⁷² *Id.* at 605.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 606.

¹⁷⁶ *Id.* at 605.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 606.

¹⁷⁹ *Id.*

note, the court did address *res judicata* briefly.¹⁸⁰ Stating *res judicata* requires a “final judgment on the merits of an action,”¹⁸¹ the court held the pension division order was a “procedural device” and not a “final judgment.”¹⁸²

A practitioner reading only the *Erlandson* case could understandably conclude against an argument for *res judicata*. Such a conclusion would be a disservice to former spouses of servicemembers. *Res judicata* cases are plentiful. A thorough review of *res judicata* with regard to a military pension share reduction must start at the U.S. Supreme Court.

A. *Mansell v. Mansell and Res Judicata*

Mansell involved *res judicata*.¹⁸³ Major Mansell and his wife entered into a property settlement which provided that Mrs. Mansell would receive 50% of “total military retirement pay, including that portion of retirement pay waived so that Major Mansell could receive disability benefits.”¹⁸⁴ The agreement was incorporated into the divorce decree entered in 1979.¹⁸⁵ Neither party appealed the divorce decree. When the wife sought enforcement years later, Major Mansell requested a modification to remove the provision dealing with disability benefits, and the trial court denied his request.¹⁸⁶ Major Mansell appealed to the California Court of Appeals.¹⁸⁷ That court rejected his argument regarding USFSPA and waived retired pay, and the Supreme Court of California denied a petition for review.¹⁸⁸ The U.S. Supreme Court reviewed the case.¹⁸⁹

Mrs. Mansell made an argument to the U.S. Supreme Court regarding *res judicata* in her supplement brief.¹⁹⁰ Noting the California Court of Appeals opened the settlement to address a fed-

¹⁸⁰ *Id.* at 606 n.5.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Mansell*, 490 U.S. at 606 n.5.

¹⁸⁴ *Id.* at 585.

¹⁸⁵ *Id.* at 586.

¹⁸⁶ *Id.* at 585.

¹⁸⁷ *Id.* at 586.

¹⁸⁸ *Id.* at 587.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 606 n.5.

eral question,¹⁹¹ the U.S. Supreme Court stated in *Mansell* that *res judicata* is “a matter of state law over which we have no jurisdiction.”¹⁹² The implications of this statement can best be addressed by a review of what happened in *Mansell*.

The U.S. Supreme Court reversed and remanded the case to the California courts in *Mansell*.¹⁹³ When the High Court remanded the case, the California Court of Appeals upheld the original indemnification order.¹⁹⁴ The basis was *res judicata*, not a division of disability pay as community property in violation of USFSPA. Major Mansell attempted to take the matter up to the U.S. Supreme Court again, but the Court denied his certiorari petition.¹⁹⁵ Nothing in federal law prevents or prohibits a servicemember from agreeing to indemnify or reimburse his spouse for waived benefits.¹⁹⁶ Therefore, *res judicata* remains a viable path to protect a military spouse with a waiver of retired pay or an indemnification problem. An unappealed order regarding a prior agreement can, based on the case history in *Mansell* described above, be a valid and persuasive argument to a court.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (1989).

¹⁹⁵ *Mansell*, 498 U.S. 806.

¹⁹⁶ See, e.g., *Poullard v. Poullard*, 780 So. 2d 498, 500 (La. Ct. App. 2001) (“[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another”); *Krapf*, 786 N.E.2d at 326 (“Nothing in 10 U.S.C. § 1408 or in the *Mansell* case precludes a veteran from voluntarily entering into a contract whereby he agrees to pay a former spouse a sum of money that may come from the VA disability benefits he receives.”); *Shelton v. Shelton*, 78 P.3d 507, 510-11 (Nev. 2003) (holding that the husband may use his disability payments to satisfy a contractual obligation to his wife not prevented by federal law); *Hoskins v. Skojec*, 265 A.D.2d 706, 707, 696 N.Y.S.2d 303 (N.Y. App. Div. 1999) (“[P]arties are free to contractually determine the division of [military disability] benefits and a court may order a party to pay such moneys to give effect to such an agreement.”); *White v. White*, 568 S.E.2d 283, 285 n.1 (N.C. Ct. App. 2002) (*Mansell* does not prohibit military spouses from contracting away their disability benefits), *aff’d*, 579 S.E.2d 248 (N.C. 2003); *McLellan v. McLellan*, 533 S.E.2d 635, 638 (Va. Ct. App. 2000) (“[F]ederal law does not prevent a husband and wife from entering into an agreement to provide a set level of payments, the amount of which is determined by considering disability benefits as well as retirement benefits.”).

B. *Res Judicata and Combat Related Special Compensation*

Louisiana tackled a *res judicata* case in 2020 with *Boutte v. Boutte*.¹⁹⁷ The parties executed a consent judgment in 2012.¹⁹⁸ In 2013, Mr. Boutte received Combat Related Special Compensation (CRSC).¹⁹⁹ CRSC is not longevity retired pay; rather, it is an additional form of compensation for retirees who meet eligibility requirements such as receiving a Purple Heart or being injured through an instrumentality of war.²⁰⁰ An election of CRSC typically requires a waiver of retired pay.²⁰¹ Mrs. Boutte stopped receiving full payment as Mr. Boutte was no longer receiving retirement benefits, and was instead receiving disability in the form of CRSC payments.²⁰²

Mrs. Boutte filed for contempt of court.²⁰³ Mr. Boutte initially objected, but subsequently withdrew his objection and entered into a stipulated consent judgment.²⁰⁴ According to that judgment, Mr. Boutte was to pay to his wife 43% of his “military retirement pay and/or benefit”²⁰⁵ and arrearages.²⁰⁶ For several years, Mr. Boutte made payments to Mrs. Boutte of 43% of his CRSC benefit.²⁰⁷ In 2018, Mr. Boutte filed a petition seeking relief from the payments.²⁰⁸ Mrs. Boutte responded, claiming *res judicata* prevented a subsequent challenge.²⁰⁹ The trial court

¹⁹⁷ 304 So. 3d 467 (La. Ct. App. 2020).

¹⁹⁸ *Id.* at 468.

¹⁹⁹ 10 U.S.C.S. § 1413a.

²⁰⁰ Kristi N. Kamarck, *Concurrent Receipt: Background and Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE (2019) (R40598), <https://sgp.fas.org/crs/misc/R40589.pdf>.

²⁰¹ CRSC wipes out CRDP. For more information, see *Military Pension Division: The “Evil Twins”—CRDP and CRSC*, SILENT PARTNER: LEGAL ASSISTANCE FOR MILITARY PERSONNEL (Nov. 22, 2015), <https://www.nclamp.gov/media/425647/s-pension.pdf>; SULLIVAN, *supra* note 14, at ch. 8.

²⁰² *Boutte*, 304 So. 3d at 469.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 471.

²⁰⁷ *Id.* at 469.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

agreed with Mrs. Boutte and dismissed Mr. Boutte's request.²¹⁰ Mr. Boutte appealed.²¹¹

The issue on appeal centered on *res judicata*.²¹² In holding for Mrs. Boutte, the court stated “[h]ad this issue not been litigated previously in this matter, an application of *Howell* would be necessary.”²¹³ The Louisiana Court of Appeals found the consent judgment was valid, Mr. Boutte had agreed to pay, and Mr. Boutte was barred by *res judicata* from re-litigating the issue.²¹⁴

Other jurisdictions have upheld the use of *res judicata* for indemnification. The Indiana Court of Appeals decided the *Edwards v. Edwards* case in 2019.²¹⁵ In 2010, the parties entered into an agreement providing that Mrs. Edwards would receive 50% of the marital pension benefit of Mr. Edwards.²¹⁶ Mr. Edwards retired from military service in 2011.²¹⁷ From May 2012 until August 2012, Mrs. Edwards received her share of the military pension.²¹⁸ Without notice or spousal consent, Mr. Edwards applied for and received CRSC.²¹⁹ Mrs. Edwards stopped receiving her pension share, and she filed to hold Mr. Edwards in contempt for his failure to pay.²²⁰ The trial court found Mr. Edwards in contempt in 2015, and it ordered him to pay Mrs. Edwards the amount she lost as a result of the CRSC election and arrearages.²²¹ No one appealed the 2015 order.

In 2018, Mr. Edwards filed a motion to vacate based upon *Howell*.²²² He argued that the court lacked subject matter jurisdiction pursuant to *Howell*.²²³ The trial court partially denied Mr. Edwards' request, finding that *res judicata* applied, but also find-

210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.* at 472.

214 *Id.*

215 *Edwards v. Edwards*, 132 N.E.3d 391 (Ind. Ct. App. 2019).

216 *Id.* at 394.

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.* at 395.

223 *Id.*

ing that it was no longer equitable for the judgment to have prospective effect.²²⁴ Mr. Edwards appealed.²²⁵ Mrs. Edwards did not file a brief and the Indiana Court of Appeals stated it would “not develop arguments on behalf of an appellee who fails to file a brief.”²²⁶

Mr. Edwards’ subject matter jurisdiction argument did not persuade the appellate court. The court determined that it had subject matter jurisdiction under state law, and indicated a question regarding the application of the law is not a subject matter jurisdiction question.²²⁷

Next, the court turned to the issue of *res judicata* with an analysis of Indiana law on the topic. The 2015 order involved identical parties, it was a final judgment on the merits, the court had jurisdiction to determine the issue, and the matter was or could have been determined in the 2015 litigation.²²⁸ Based upon these determinations, the Indiana Court of Appeals held that the 2015 order “was *res judicata* as to the parties and precluded further litigation on the same issue of whether Valerie [Edwards] was entitled to the value of 50% of Edwards’ pension benefit.”²²⁹

The above cases demonstrate that *res judicata* provides a viable argument for a practitioner faced with an indemnification problem. The use of *res judicata* is limited to cases involving an unappealed order, as that is essential to succeed on a *res judicata* argument. No review of *res judicata* and indemnification would be complete without including two landmark cases decided from Michigan and Nevada in the past couple of years.

C. A Seminal Case: *Foster v. Foster*

*Foster v. Foster*²³⁰ (*Foster I*) was decided on April 29, 2020. The Michigan Supreme Court determined that the parties’ consent judgment was unenforceable to the extent that it required Mr. Foster to reimburse Mrs. Foster for a reduction in her share

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 396.

²²⁸ *Id.* at 396-97.

²²⁹ *Id.* at 397.

²³⁰ 949 N.W.2d 102 (Mich. 2020).

of the retired pay.²³¹ The basis of the decision was that 10 U.S.C.S. § 1408, USFSPA, preempted state law and prevented enforcement of the parties' agreement.²³²

A consent judgment of divorce was entered between the parties in December 2008.²³³ Mrs. Foster was awarded 50% of disposable military retired pay, and was not awarded any military disability benefits.²³⁴ The parties included a provision requiring that, in the event of disability pay, Mr. Foster would pay Mrs. Foster an amount equal to what she would have received had Mr. Foster not received disability pay.²³⁵ Mr. Foster elected to receive CRSC, reducing Mrs. Foster's share to approximately \$200 per month from approximately \$800 per month.²³⁶

Mrs. Foster sought to hold Mr. Foster in contempt.²³⁷ The trial court denied her request, but it ordered Mr. Foster to pay Mrs. Foster in 2010.²³⁸ In 2011, Mrs. Foster again sought contempt for nonpayment, and the court entered an order holding Mr. Foster in contempt.²³⁹ The trial court held a contempt hearing in 2014, resulting in an order holding Mr. Foster in contempt and ordering him to pay the arrearage and attorney fees.²⁴⁰ Mr. Foster appealed.²⁴¹

Foster v. Foster (Foster II) was decided by the Supreme Court of Michigan in 2022.²⁴² *Foster II* was heard before the entire Michigan Supreme Court.²⁴³ The Michigan Supreme Court

²³¹ *Id.*

²³² *Id.* Note that despite *Foster II*, *Foster I* may still apply to cases in which the agreement remains a private contract. Since *Foster II* was decided on other grounds, at least arguably, *Foster I* was not overruled by *Foster II*.

²³³ *Id.* at 115.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 115-16.

²³⁷ *Id.* at 116.

²³⁸ *Id.*

²³⁹ *Id.* at 117. The order also awarded Mrs. Foster a money judgment, and issued an order for Mr. Foster's arrest because he did not appear at the hearing.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Foster v. Foster*, 983 N.W.2d 373 (Mich. 2022), *amended but not overruled by Foster v. Foster*, 974 N.W.2d 185 (Mich. 2022). Note, *Foster* has a complex procedural history beyond the scope of this article.

²⁴³ *Foster*, 983 N.W.2d at 375.

authorized the prior indemnification clause that was not appealed.²⁴⁴

In a *de novo* review, the Supreme Court of Michigan considered the question of whether *res judicata* applied.²⁴⁵ Even though it might be preempted by federal law, the Supreme Court found that the parties' consent judgment was enforceable under the doctrine of *res judicata*.²⁴⁶

Mr. Foster argued the indemnification provision was void because it was preempted by federal law²⁴⁷ and because the *Howell* case deprived Michigan courts of subject matter jurisdiction.²⁴⁸ The Michigan Supreme Court rejected the preemption argument, noting that simply because an agreement conflicts with federal law does not render a judgment void.²⁴⁹ The subject matter jurisdiction argument put forth by Mr. Foster required the court to find that the federal government had entirely occupied the field, and had given exclusive jurisdiction of military disability benefits to a federal forum.²⁵⁰ Relying on *Rose v. Rose*,²⁵¹ the court rejected Mr. Foster's argument. The U.S. Supreme Court in *Rose* stated:

[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. On the rare occasion when a state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be pre-empted. Before a state law governing domestic relations will be overridden, it must do major damage to clear and substantial federal interests.²⁵²

Finding no exclusive federal forum, and applying the test as limited by the U.S. Supreme Court in *Rose*, the Michigan Supreme Court held in the *Foster II* case that federal preemption did not deprive state courts of jurisdiction. This is an important case on

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 379.

²⁴⁶ *Id.* at 380.

²⁴⁷ *Id.* at 381.

²⁴⁸ *Id.* at 382.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Rose v. Rose*, 481 U.S. 619, 625 (1987).

²⁵² *Id.* (quotations and citations omitted).

the *res judicata* front, particularly for attorneys representing spouses faced with a reduction in pension share.

D. A Milestone Victory for Spouses: *Martin v. Martin*

Another important *res judicata* case was decided on December 1, 2022. That case was *Martin v. Martin*,²⁵³ decided by the Supreme Court of Nevada. The parties signed a marital settlement agreement and subsequently divorced in 2015.²⁵⁴ The decree included a provision allotting Mrs. Martin one-half of Mr. Martin's retirement benefits and stating that Mr. Martin would make up any deficit if disability pay impacted the wife's share.²⁵⁵

Mr. Martin retired in 2019.²⁵⁶ Mrs. Martin received her share until 2020, when she was informed that Mr. Martin had waived all retired pay.²⁵⁷ Mr. Martin told Mrs. Martin he would not pay her, saying he was not required to do so under federal law.²⁵⁸ Mrs. Martin sought enforcement of the divorce decree.²⁵⁹

Over Mr. Martin's objection that reimbursement or indemnification is unenforceable under *Howell* and federal law, the trial court held that federal law did not overrule contract law. It held that the decree was binding due to *res judicata*, and ordered Mr. Martin to indemnify Mrs. Martin.²⁶⁰

Mr. Martin appealed. The Nevada Court of Appeals reversed the order enforcing the decree.²⁶¹ The Supreme Court of Nevada granted Mr. Martin's petition for review, and received an amicus curiae brief from the American Academy of Matrimonial Lawyers (AAML).²⁶²

²⁵³ 520 P.3d 813 (Nev. 2022). The husband in the *Martin* case filed a motion for reconsideration, which was denied. He subsequently filed a petition for certorari with the U.S. Supreme Court. Email from Marshall Willick dated July 24, 2023 (on file with author).

²⁵⁴ *Id.* at 815.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 816.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Martin v. Martin*, 498 P.3d 1289 (Nev. Ct. App. 2021)(unpublished). The Nevada Court of Appeals also addressed an attorney fee issue, which is not within the scope of this article.

²⁶² *Martin*, 520 P.3d at 816.

Relying on *Howell* and USFSPA, Mr. Martin argued that state courts are preempted from dividing military disability retirement benefits.²⁶³ In addition, Mr. Martin argued that reliance on contract principles and *res judicata* is misplaced and that the Nevada trial court could not enforce the divorce decree.²⁶⁴ Mr. Martin further argued that Congress has specifically entered this territory, preempting state law in the arena of division of military disability benefits.²⁶⁵

Mrs. Martin argued that *res judicata* was appropriate because there was a negotiated and agreed upon resolution in the form of a divorce decree.²⁶⁶ Federal law does not prohibit enforcement of a final, unappealed decree.²⁶⁷ *Howell* is distinguishable because *Howell* did not involve a contractual indemnification provision, nor did it involve *res judicata*.²⁶⁸ Further, *Howell* allows the parties to draft divorce terms in consideration of a possible future waiver of retired pay.²⁶⁹

The Nevada Supreme Court took steps to distinguish the *Howell* decision. First, *Howell* involved a court-ordered indemnification.²⁷⁰ The decree in *Howell* was enforced via a court ordered indemnification after Mr. Howell waived a portion of his retired pay for military disability benefits.²⁷¹ The rationale for the reversal centered on prohibiting reimbursement or indemnification because such an order would be a division of disability benefits in violation of federal law.²⁷² The Nevada Supreme Court explained:

Howell and *Mansell* thus provide that federal law preempts state courts from treating disability benefits as community property that may be divided to reimburse a divorcing spouse for a lost or diminished share of retired pay. Neither of those cases, however, involved

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 817.

²⁷¹ *Id.*

²⁷² *Id.*

the parties agreeing to an indemnification provision in the divorce decree property settlement.²⁷³

Mansell involved a court refusing to modify an unappealed divorce decree where the parties included military disability benefits as community property.²⁷⁴ *Howell* overturned a court-ordered indemnification of the original amount in the divorce decree.²⁷⁵ By contract, Mr. and Mrs. Martin had agreed upon reimbursement terms, which were incorporated into an unappealed order.²⁷⁶ Using the above analysis, the Nevada Supreme Court approved distinguishing *Howell* and *Mansell* in a case involving *res judicata* or contractual indemnification.

The doctrine of preemption did not prevent the court's enforcement under *res judicata* and contract theories. The Supremacy Clause in the U.S. Constitution mandates that federal law is the supreme law of the land.²⁷⁷ Preemption occurs in two circumstances: first, when state law directly conflicts with a federal statute (referred to as "express preemption"); second, when Congress intended federal law to occupy a field exclusively (referred to as "field preemption").²⁷⁸ Typically state law controls divorce and domestic relations; however there are some occurrences where Congress has legislated in this area.²⁷⁹ The Supreme Court found that "neither express preemption nor field preemption apply" in the *Martin* case.²⁸⁰

Acknowledging that *Howell* holds that the USFPSA does preempt state courts from dividing disability benefits as community or marital property, the Nevada Supreme Court distinguished the situation in *Martin*.²⁸¹ The district court did not divide disability benefits as community property when it enforced the parties' decree under contract theory and *res judi-*

²⁷³ *Id.* (quotations and citations omitted).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ U.S. CONST. art. VI, cl. 2.

²⁷⁸ *Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 630-31 (2012). But note that *Rose*, 481 U.S. 619, arguably limits the family law application of preemption.

²⁷⁹ See *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979); *Mansell*, 490 U.S. 581.

²⁸⁰ *Martin*, 520 P.3d at 818.

²⁸¹ *Id.*

cata.²⁸² USFPSA limits what a state court may impose as a division of property, not what a servicemember and his spouse may agree to in contract or a consent order.²⁸³ *Howell* and *Mansell* addressed neither contract issues nor *res judicata*. As previously noted, *Mansell* leaves *res judicata* to the state court.²⁸⁴ A majority of states recognize that military disability benefits can be divided under the law of *res judicata*.²⁸⁵

The Nevada Supreme Court concluded with the following holding:

Under federal law, state courts may not treat disability pay as community property that may be divided in allocating the parties' separate property. This prohibition does not prevent state courts, however, from enforcing an indemnification provision in a negotiated property settlement as *res judicata*. As *res judicata* applies to the divorce decree at issue here, we conclude the district court properly ordered its enforcement.²⁸⁶

Based upon *Martin*, the path is clear to address future cases involving indemnification and either contractual indemnification provisions, *res judicata*, or both.

IV. Other Approaches

A. Alimony

While this is a summary, as opposed to a review of every case since *Howell*, two important topics must be mentioned: the intersection of alimony and military disability benefits, and the use of other remedies such as property offsets. One option for the practitioner faced with a disability issue that may impact a former spouse's share is the use of alimony.²⁸⁷ Alimony, if available, provides a similar benefit to a pension in the form of periodic payments.²⁸⁸ The use of alimony is an excellent tool in the practitioner's toolbox when representing the former spouse of a servicemember or military retiree.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See *supra* discussion of *Mansell* and footnote 5 in text at notes 183-196.

²⁸⁵ *Martin*, 520 P.3d at 819(quotations and citations omitted).

²⁸⁶ *Id.* at 821.

²⁸⁷ SULLIVAN, *supra* note 14, at ch. 8.

²⁸⁸ *Id.*

The use of alimony in a post-*Howell* analysis starts with *Howell* itself.²⁸⁹ Justice Breyer stated that state courts “remain free” to take into account the possibility of a future waiver of military retired pay “when calculating or recalculating the need for spousal support.”²⁹⁰ Indeed, some states have followed suit, and approved or mentioned the use of alimony as a measure to assist spouses in retrieving a lost or reduced pension share.²⁹¹

The use of alimony to redress a lost or reduced share of a military pension based upon a disability waiver is not without problems. An indefinite reservation of alimony may not be an option under state law.²⁹² The facts of the case do not always support an award or reservation of alimony.²⁹³ Often, the military disability at issue is not known at the time of divorce and does not come up until years later.²⁹⁴ In the *Howell* case, it was over a dozen years after the divorce when the ex-husband started to receive disability compensation.²⁹⁵ It is not possible to predict and plan for a future unknown disability. And even if such a crystal ball existed, it would not be able to reveal the extent to which the disability pay impacted the division in order to determine the amount of compensatory alimony. Finally, alimony would have to last for the life of the parties to fully match the pension share, which ends upon the death of either party.²⁹⁶ Obtaining alimony for life may not be possible, and terminating

²⁸⁹ *Howell*, 581 U.S. 214.

²⁹⁰ *Id.* at 215.

²⁹¹ See *Fattore v. Fattore*, 203 A.3d 151 (N.J. Super. Ct. App. Div. 2019); *Jennings v. Jennings*, No. 16AP-711, 2017 WL 6343553 (Ohio Ct. App. Dec. 12, 2017).

²⁹² For example, North Carolina does not allow a reservation of alimony after divorce. See N.C. GEN. STAT. § 50-11.

²⁹³ *Hardy v. Hardy*, 429 S.E.2d 811, 813 (S.C. Ct. App. 1993) (“there was no present or foreseeable circumstance which would warrant the reservation of alimony”).

²⁹⁴ See, e.g., *Brown*, 260 So. 3d 851 (addressing a 2010 divorce, and a 2016 inception date for disability benefits); *Erlandson*, 973 N.W.2d 601 (denied the former spouses’ request for additional property or spousal support when a pension order was entered and the husband received disability “years later”).

²⁹⁵ *Howell*, 581 U.S. at 214.

²⁹⁶ DEFENSE FINANCE AND ACCOUNTING SERVICE, *Arrears of Pay*, <https://www.dfas.mil/retiredmilitary/provide/aop/> (last visited May 2, 2023) (“your entitlement to retirement pay ends on the date of your death.”).

events may be an issue. A pension share does not end on remarriage or cohabitation, unlike alimony in most states.²⁹⁷

If alimony is used, taxation must be considered. The Tax Cuts and Jobs Act of 2017 made alimony non-taxable to the recipient, and non-deductible to the payor.²⁹⁸ In contrast, a pension share is generally taxable to the recipient.²⁹⁹ Therefore, the former spouse gains an advantage in the use of alimony as a replacement for a pension share because the alimony is tax free.

The use of alimony to compensate for the loss of money in pension division may even be restricted under state law. For example, Oklahoma law specifically prohibits the consideration or use of VA disability compensation for alimony purposes.³⁰⁰ Going a step further, Oklahoma specifically outlaws an offset of income based upon a service-related disability with any other assets of a servicemember.³⁰¹

Alimony can work, but a practitioner must check state law. A tax professional such as a certified public accountant may need to be employed to address the tax differential between pension share and alimony. Counsel will have to put in the time and do the research required to make the best argument for the servicemember or spouse, depending on who they represent.

B. *Property Division Offset*

A practitioner may consider using a present-value offset or seeking an unequal distribution of the marital or community property. The basis of this starts with *Howell* itself. Justice Breyer made it clear that “when [family courts] first determine the value of a family’s assets,” they may “take account of the contingency that some military retirement pay might be

²⁹⁷ See, e.g., FLA. STAT. ANN. § 61.14 (LexisNexis, Lexis Advance through the 2022 regular and extra sessions).

²⁹⁸ Tax Cuts and Jobs Act, Pub. Law No. 115-97, 131 Stat. 2054 (2018).

²⁹⁹ IRS Publication 4782 (Rev. 8-2020), <https://www.irs.gov/pub/irs-pdf/p4782.pdf> (last visited Mar. 6, 2023); DEFENSE FINANCE AND ACCOUNTING SERVICE, *Frequently Asked Questions*, <https://www.dfas.mil/garnishment/usfspace/faqs/> (last visited Mar. 6, 2023).

³⁰⁰ OKLA. STAT. tit. 43, § 134 (LexisNexis, Lexis Advance through the end of legislation of the 2022 Second Regular Session of the 58th Oklahoma Legislature and the First and Second Extraordinary Session of the 58th Oklahoma Legislature).

³⁰¹ *Id.*

waived.”³⁰² Some state courts have echoed Justice Breyer’s sentiment, stating: “[t]here is nothing in the federal law that prevents state courts from considering disability pay in dividing other assets.”³⁰³ If a waiver of some or all of a spouse’s share is anticipated or known, obtaining a greater share of other assets makes sense and is an equitable result for all involved. In many military cases, the military pension is one of the largest assets and other assets may not be sufficient to cover the loss.³⁰⁴

The potential waiver of some or all of the pension in exchange for tax-free VA disability compensation is commonly not predictable at the time of the divorce, and it is often not discovered until years later.³⁰⁵ Reopening the property division (if allowed in by state law) has practical and procedural problems. The procedural mechanism to reopen the judgment may have time limits,³⁰⁶ or may otherwise not be factually appropriate or legally available. Practical problems with reopening a property division years later include whether the property was disposed of, tracing problems, debt attached to property and payments on debt with separate property, real property with a new joint owner (likely a new spouse), refinances or new financing on previously unencumbered property, and more. For the right situation, an offset of other assets is a viable option. However, as shown above, this is not a simple or easy solution.

Conclusion

“Nothing . . . will ever be attempted if all possible objections must first be overcome.”³⁰⁷ There are no perfect solutions available for a former spouse faced with an indemnification problem. The best approach is to first attempt to obtain a contractual indemnification provision. If preferred for the case and client,³⁰⁸

³⁰² *Howell*, 581 U.S. at 222.

³⁰³ *Babin*, 437 P.3d at 992.

³⁰⁴ SULLIVAN, *supra* note 14, at ch. 8.

³⁰⁵ See *supra* discussion in text at note 295.

³⁰⁶ See, e.g., N.C. R. Civil P., r. 60 (imposing a “reasonable time” in some instances, and a 1-year time limit for certain relief).

³⁰⁷ SAMUEL JOHNSON, RASSELAS, PRINCE OF ABYSSINIA (Cassell & Co. 1889).

³⁰⁸ While it is common practice in some states, other states have a process by which incorporation must be requested and approved by the court. In some

the agreement including the indemnification provision should be incorporated into a divorce decree. Taking these steps provides the spouse with the arguments outlined above which distinguish the *Mansell* and *Howell* cases on the basis of *res judicata* and contract principles. Further, the spouse could craft an argument based upon the cases that were decided similarly, such as the *Martin* case or the *Yourko II* case.³⁰⁹ Alimony should be considered as a possible workaround, as should an offset or receipt of a greater share of other community or marital assets. Other remedies may include a sum-certain award, use of waived retired pay as a factor in the property division, and reopening the divorce.³¹⁰

If representing the servicemember, the best approach would be to avoid entering into an agreement that provides for reimbursement or indemnification if retired pay is waived or the spouse's share is reduced. If a court orders indemnification over the servicemember's objection, a timely appeal should be taken to avoid the effects of *res judicata*. Approaches to the other options (such as alimony, sum-certain award, etc.) are heavily fact-specific, and will need to be addressed on a case-by-case basis. Obtaining a divorce and a final result that does not involve indemnification remains the best general approach for a servicemember to address the other options a spouse may have.

Courts faced with an indemnification issue should carefully analyze the facts and circumstances. For courts and practitioners, it is absolutely essential to understand the relationship between the facts and the law in the area of waived military retired pay and reimbursement provisions in a post-*Howell* case. When briefing the case, preparing a motion or petition, or handling an oral argument, counsel must know and be able to either distinguish or point out the similarities between cases like those analyzed above and *Howell*. If a practitioner does not handle military family law cases on a regular basis, it is important to seek

states, there are collateral consequences for incorporation. *Walters v. Walters*, 298 S.E.2d 338, 342 (N.C. 1983) ("Whenever the parties bring their separation agreements before the court for the court's approval, it will on longer be treated as a contract between the parties. All separation agreements approved by the court as judgments of the court will be treated . . . as court ordered judgments.").

³⁰⁹ *Martin*, 520 P.3d 813; *Yourko*, 884 S.E.2d 799.

³¹⁰ For more on these possible remedies, see TURNER, *supra* note 37, at § 6:10.

the assistance of a competent co-counsel, such as a former Judge Advocate General or an attorney with special expertise who focuses on military family law cases.

Howell and indemnification issues persist in state family law cases. Given the different results among the states detailed above, it would be of great assistance to spouses and servicemembers (and their attorneys) across the nation if the U.S. Supreme Court were to clearly rule on indemnification by agreement and *res judicata*. Until then, indemnification and waived retired pay will create challenges for the family law practitioner in a military divorce case.

